SUPREME COURT, U. S.

No. 73-506

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

DIAMOND CAB COMPANY OF SAN DIEGO COUNTY, INC.,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO,
Respondent,

and

JOHN F. DUFFY, SHERIFF OF COUNTY OF SAN DIEGO,
Real Party in Interest.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR REAL PARTY IN INTEREST IN OPPOSITION

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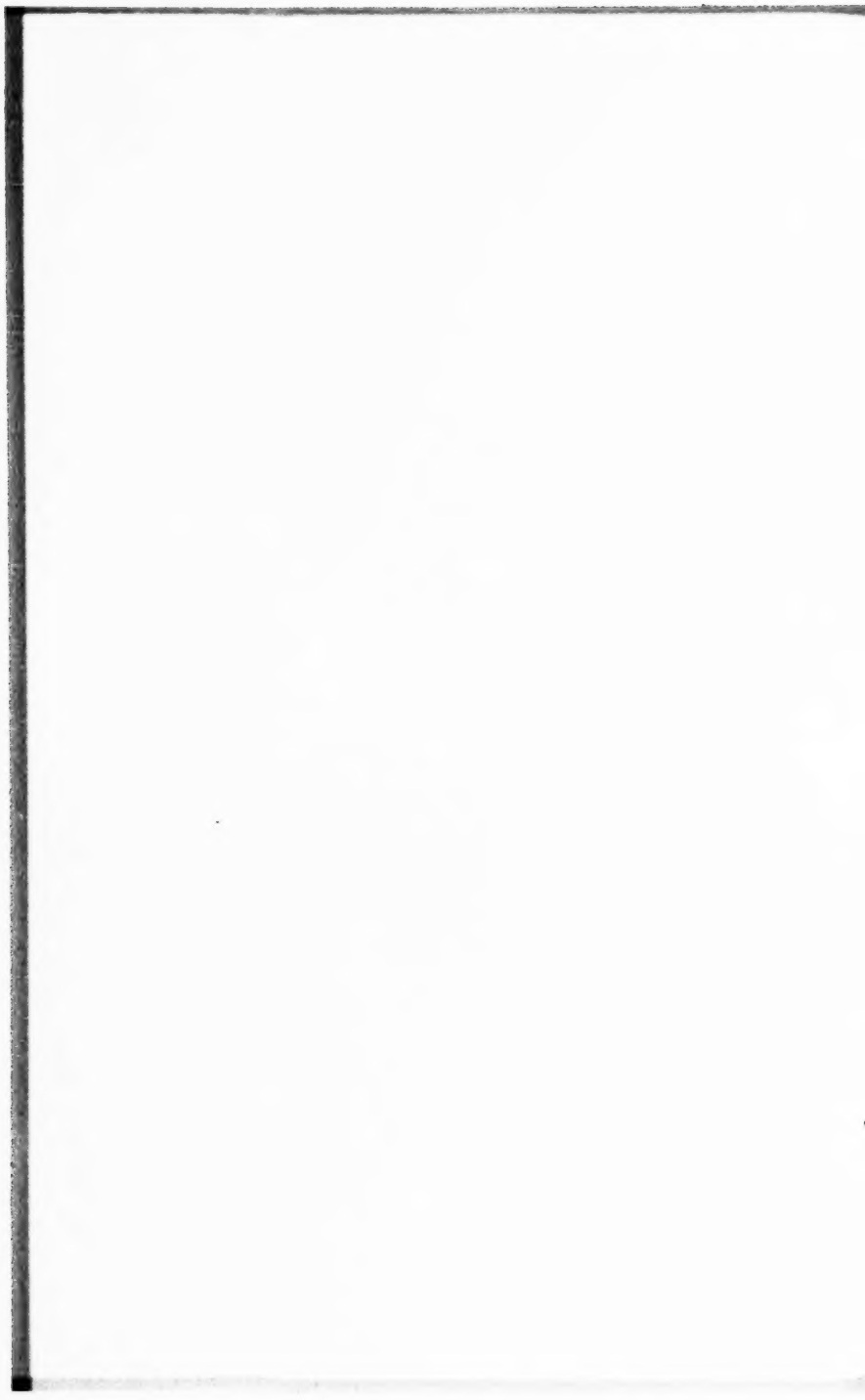

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR REAL PARTY IN INTEREST IN OPPOSITION

PRELIMINARY STATEMENT

Petitioner seeks a Writ of Certiorari to the Supreme Court of California to review that court's order filed June 20, 1973 denying a hearing following the order of the Court of Appeal of the

State of California, Fourth Appellate District filed May 1, 1973 denying petitioner's petition for a writ of mandate to the Superior Court of the State of California for the County of San Diego. A copy of the orders of the Supreme Court of California and of the Court of Appeal are appended to the Petition for Writ of Certiorari docketed in this Court on September 18, 1973.

JURISDICTION

Jurisdiction in the Petition is invoked pursuant to Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED

The Petition raises the following question (as phrased by petitioner):

What is the present permissible basis for suspension or revocation of a license or operating permit, such as a certificate of public convenience and necessity, without a prior hearing?

CONSTITUTIONAL PROVISION INVOLVED

Petitioner alleges that basic due process rights guaranteed by the 14th Amendment to the United States Constitution possibly have been violated by the actions of real party in interest under the authority of Section 21.305 of Chapter 3, Division 1, Title 2 of the San Diego County Code of Regulatory County Ordinances (hereinafter referred to as "County Code") (Ordinance No. 3905 (N.S.)), set forth in the petition at pp. 3-4.

STATEMENT OF THE CASE

On March 9, 1973, the Sheriff of San Diego County, real party in interest herein, acting in his official capacity and pursuant to Section 21.305 of the County Code, suspended for

a period of thirty days the certificate of public convenience and necessity which petitioner is required to possess in order to engage in the business of operating any taxicab in the unincorporated area of San Diego County.

Petitioner, in its complaint dated March 10, 1973 and filed March 12, 1973 in the Superior Court of the State of California for the County of San Diego, respondent herein, requested injunctive relief alleging that the suspension violated basic due process rights guaranteed by the 14th Amendment to the United States Constitution and by Article 1, Section 13 of the California Constitution in that it deprived petitioner of property rights, i.e., the operation of its taxicabs, without affording it a prior hearing on the allegations upon which said suspension was based.

On March 10, 1973 respondent court entered a temporary restraining order against enforcement of the Sheriff's order pending hearing in that court.

Prior to the hearing in respondent court, petitioner appealed the suspension order of the Sheriff to the San Diego County Board of Supervisors pursuant to Section 21.321 of the County Code which reads:

"Whenever an appeal is provided for in this chapter, such appeal shall be filed and conducted as prescribed in this section:

"(a) Within fifteen (15) calendar days after the date of any denial, suspension, revocation or other decision of the Sheriff, any aggrieved party may appeal such denial, suspension, revocation or other decision by filing with the Clerk of the Board of Supervisors a written appeal briefly setting forth the reasons why such denial, suspension, revocation or other decision is not proper.

"(b) Upon receipt of such written appeal, the Clerk of the Board of Supervisors shall schedule a hearing to be held by the Board of Supervisors within fifteen (15) days after the date of said receipt. At least one week prior to the date of the

hearing on the appeal the Clerk shall notify the appellant and Sheriff of the date and place of the hearing. At such hearing the Sheriff and the appellant may present evidence relevant to the denial, suspension, revocation or other decision of the Sheriff.

"(c) At the conclusion of the hearing the Board of Supervisors may uphold the denial, suspension, revocation or other decision of the Sheriff or the said Board may allow that which has been denied, reinstate that which has been suspended or revoked or modify or reverse any other Sheriff's decision which is the subject of the appeal. The decision of the Board of Supervisors is final."

On April 4, 1973 following a hearing at which petitioner was represented by counsel, sworn testimony was presented, and an opportunity for cross-examination was afforded, the Board of Supervisors sustained the Sheriff's action and denied the appeal.

On April 20, 1973 respondent court entered its order denying petitioner's application for preliminary and permanent injunction. The temporary restraining order in effect since March 10, 1973 was continued in effect through May 4, 1973. Following the April 20, 1973 order denying petitioner's application, petitioner on April 24, 1973 filed a First Amended Complaint in respondent court. It was in this First Amended Complaint that petitioner for the first time alleged constitutional infirmity in the ordinance itself, the original complaint having made no specific allegation as to the ordinance section, but having complained only of the actions of the Sheriff.

On April 26, 1973 petitioner complaining only of the respondent court's order of April 20, 1973 petitioned the Court of Appeal for an extraordinary writ in the nature of mandate pursuant to Section 1085 of the California Code of Civil Procedure. That section reads:

"It [the writ of mandate] may be issued by any court, except a municipal or justice court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is lawfully precluded by such inferior tribunal, corporation, board or person."

The Court of Appeal denied the petition by its order filed May 1, 1973 (See Petition, Appendix p. 2).

Petitioner acting pursuant to Rule 29 of the California Rules of Court then petitioned the Supreme Court of California to grant a hearing. Rule 29 sets out the limited grounds for granting a hearing as follows:

"(a) A hearing in the Supreme Court after decision by a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important questions of law; (2) where the Court of Appeal was without jurisdiction of the cause; or (3) where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges.

"(b) On petition for hearing the Supreme Court will not examine the record for error unless the petition shows that substantial issues of law or fact were incorrectly stated or were not considered in the opinion of the Court of Appeal and that such issues were raised in the briefs and set forth in a petition for rehearing in the Court of Appeal."

The Supreme Court of California stayed all proceedings on May 4, 1973, and on June 20, 1973 it denied the petition and terminated the stay order (See Petition, Appendix p. 1).

ARGUMENT

I

CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE BECAUSE EVEN IF A SUBSTANTIAL QUESTION EXISTS AS TO THE CONSTITUTIONALITY OF THE ORDINANCE ON ITS FACE, PETITIONER WAS AFFORDED DUE PROCESS BY THE APPEAL HEARING BEFORE THE COUNTY BOARD OF SUPERVISORS WHILE THE TEMPORARY RESTRAINING ORDER WAS IN EFFECT.

As set out in the Statement of the Case, the Sheriff suspended petitioner's certificate of public convenience and necessity on March 9, 1973. On March 10, 1973, respondent court entered a temporary restraining order enjoining and restraining enforcement of the suspension pending a hearing on petitioner's application for preliminary and permanent injunction. While the restraining order was in effect, petitioner appealed the Sheriff's order to the Board of Supervisors pursuant to Section 21.321 of the County Code. After an evidentiary hearing on April 4, 1973, the Board of Supervisors denied the appeal and affirmed the Sheriff's order.

The Sheriff takes the position that this Court should not grant certiorari because it is not required to address the question of the constitutionality of the ordinance, even if such question does exist, because the evidentiary hearing before the Board of Supervisors afforded due process to petitioner during the period when enforcement of the Sheriff's order was restrained by respondent court.

A rule which is regularly cited and followed by the Supreme

Court is to exercise caution in dealing with the constitutionality of legislation and to consider constitutional questions only when the answers are necessary to the disposition of the case. (*Rosenberg* v. *Fleuti* [1963] 374 U.S. 449, 451, 10 L.Ed.2d 1000, 1002; *Communist Party* v. *Catherwood* [1961] 367 U.S. 389, 392, 6 L.Ed.2d 919, 922; *Steffanelli* v. *Minard* [1951] 342 U.S. 117, 120, 96 L.Ed. 138, 142; *United States* v. *Butler* [1936] 297 U.S. 1, 67, 80 L.Ed. 477, 489.)

The issue of the constitutionality of the ordinance provision was rendered moot by the hearing before the Board of Supervisors and there is no basis for inquiry into that issue. (*Doremus* v. *Board of Education* [1952] 342 U.S. 429, 432-433, 96 L.Ed. 475, 479; *Davies* v. *Ichord,* 442 F.2d 1207, 1211-1212 [D.C. Cir. 1970]; *Troy State University* v. *Dickey,* 402 F.2d 515, 516 [5th Cir. 1968].)

A recent and relevant example of the Supreme Court's declining to address the question of the constitutionality of legislation when the issue was no longer present is found in *Jennings* v. *Mahoney* (1971) 404 U.S. 25, 30 L.Ed.2d 146, wherein the Court stated in affirming the judgment of the Supreme Court of Utah:

> "There is plainly a substantial question whether the Utah statutory scheme on its face affords the procedural due process required by Bell v. Burson. This case does not, however, require that we address that question. The District Court in fact afforded this appellant such procedural due process. That court stayed the Director's suspension order pending completion of judicial review, and conducted a hearing at which appellant was afforded the opportunity to present evidence and cross examine witnesses. . . ."

(*Id.* at 26-27, 30 L.Ed.2d at 148.)

II

CERTIORARI SHOULD NOT BE GRANTED IN THIS CASE BECAUSE IT IS NOT CLEAR FROM THE RECORD THAT A FEDERAL QUESTION WAS RAISED BEFORE AND DECIDED BY THE SUPREME COURT OF CALIFORNIA AND THEREFORE THERE IS INSUFFICIENT BASIS TO SUPPORT JURISDICTION IN THE UNITED STATES SUPREME COURT.

Based upon a review of the record before the United States Supreme Court it is not clear that a federal question was raised before and decided by the Supreme Court of California. The United States Supreme Court has vacated judgments of and remanded cases to the California Supreme Court for further proceedings when it determines that a clarification is necessary. (*Department of Motor Vehicles* v. *Rios* [1973] 410 U.S. 425, 35 L.Ed.2d 398; *Department of Mental Hygiene* v. *Kirchner* [1965] 380 U.S. 194, 13 L.Ed.2d 753.)

Although this option is clearly open to the Supreme Court, the Sheriff urges that despite the apparent lack of clarity of the record, there is a strong probability that the Supreme Court of California did not address itself to the question of the constitutionality of the ordinance under the 14th Amendment to the United States Constitution, but decided the matter on the basis of independent non-federal grounds adequate to support its judgment.

Although the original complaint filed by petitioner in respondent court did allege that the Sheriff's action violated the due process clause of the 14th Amendment to the United States Constitution, as well as Article 1, Section 13 of the California Con-

stitution, it is true as stated by petitioner (Petition, p. 4) that respondent court did not rule on the constitutional issue.

The avenue which petitioner selected to proceed through the California appellate courts is significant to substantiate the Sheriff's position that the decisions of the state courts in this matter were based on non-federal grounds.

Initially, petitioner requested the Court of Appeal to issue a writ of mandate to respondent court. This extraordinary writ is granted only under the provisions of Section 1085 of the California Code of Civil Procedure. Under California law a petition for mandate must demonstrate that it is clearly entitled to the writ before it will issue. (*Monarch Cablevision Inc.* v. *City Council* [1966] 239 Cal.App.2d 206, 211, 48 Cal.Rptr. 550, 553-554.) Respondent is vested with discretion which cannot be controlled by mandamus. (*Faulkner* v. *California Toll Bridge Auth.* [1953] 40 Cal.2d 317, 326, 253 P.2d 659,665.)

In *State Farm Mutual Automobile Ins. Co.* v. *Superior Court* (1956) 47 Cal.2d 428, 432, 304 P.2d 13, 15, the California Supreme Court stated:

> "Mandate lies to control judicial discretion when that discretion has been abused. [citations] 'In a legal sense discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered.' [citation]"

In order to secure the writ of mandate in the Court of Appeal, petitioner had to demonstrate that the respondent court abused its discretion by issuing the order denying its request for preliminary and permanent injunction.

It has also been held by the California courts that granting or denying a petition for writ of mandate lies in the sound discretion of the court. (*Pettis* v. *Municipal Court* [1970] 12 Cal.App.

3d 1029, 1031, 91 Cal. Rptr. 263, 265; *Barnard v. Municipal Court* [1956] 142 Cal.App.2d 324, 326, 298 P.2d 679, 680.)

Real party in interest in opposing the petition for writ of mandate advanced several reasons why the Court of Appeal should exercise its discretion in favor of denying the petition.

Initially, it was urged that the petition was defective because it contained specific allegations regarding the ordinance itself which had never been presented to respondent court until the First Amended Complaint filed after the complained of order of April 20, 1973 and therefore could not have been considered by that court in issuing that order.

It was urged that respondent court was under no duty to consider the constitutionality of the procedure or the ordinance itself in view of the appeal hearing conducted by the Board of Supervisors while the matter was pending before respondent court and while the restraining order was in effect.

Section 1086 of the California Code of Civil Procedure states:

> "The writ [of mandate] must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested."

The Sheriff took the position in the Court of Appeal that a writ of mandate was not appropriate in that petitioner had failed to exhaust the available remedy of administrative mandamus from the decision of the Board of Supervisors upholding the Sheriff's order. This remedy authorized by Section 1094.5 of the California Code of Civil Procedure and immediately available provides for inquiry into the validity of an administrative order or decision.

It was clear also that petitioner had an adequate remedy at

law in the nature of an appeal from the order of respondent court and the Sheriff urged the Court of Appeal to deny the writ because of this available remedy.

Real party in interest finally urged that respondent court not have abused its discretion in view of the petitioner's failure in any event to demonstrate the ordinance's unconstitutionality. Under California law legislative enactments are presumed to be valid. (*Lockheed Aircraft Corp.* v. *Superior Court* [1946] 28 Cal. 2d 481, 484; 171 P. 2d 21, 23.)

In *Francis* v. *County of Stanislaus* (1967) 249 Cal.App.2d 862, 870-871, 57 Cal.Rptr. 881, 887, the court reaffirmed this presumption and applied it to the enactment of local ordinances. Real party in interest herein in substantiation of his position that the ordinance is constitutional cited the recent case of *Stewart* v. *County of San Mateo* (1966) 246 Cal.App.2d 273, 54 Cal.Rptr. 599, wherein the Court of Appeal in a matter regarding the revocation of a special police permit by the Sheriff upheld the identical procedure to that employed here.

Based on the foregoing, it is clear that the decision of the Court of Appeal was most probably based on a non-federal ground not related to a question of the ordinance's constitutionality.

As stated above, the granting or denying of a hearing by the Supreme Court of California also is based up showing extraordinary circumstances and the grounds are strictly limited to those set out in Rule 29 of the California Rules of Court above-quoted. The petition in that court was grounded on the theory that the granting of a hearing was necessary to secure the settlement of an important question of law under subparagraph (a) (1) of Rule 29. Based upon the foregoing, it is also clear

that the decision of that court denying the hearing was in all probability based on state grounds.

CONCLUSION

It is the crucial test to the exercise of certiorari jurisdiction that the controlling issue in the state court must be a federal issue and that such issue must meet the substantial question test, that the federal question must have been properly raised in the state court and that the state court decision does not rest on an independent state ground.

It is clear that the petitioner herein does not present the requisites to warrant the exercise of certiorari jurisdiction by the United States Supreme Court.

Even if it be concluded that the constitutionality of the ordinance was properly raised and was the basis for the decisions of the California courts, the question should not be considered as substantial to warrant the granting of certiorari in view of the clear constitutionality of the ordinance.

Therefore, Real Party in Interest respectfully urges that this honorable Court deny the Petition sought herein.

Respectfully submitted,

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Real Party in Interest.

Certificate of Service

I hereby certify that on this tenth day of October, 1973, three copies of the Brief for Real Party in Interest in Opposition were mailed, postage prepaid, to each of the following named persons:

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I further certify that all parties required to be served have been served.

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